

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

LANDMARK LEGAL FOUNDATION,

Plaintiff,

vs.

CA No. 12-1726  
Washington, DC  
January 28, 2015  
9:40 a.m.

U.S. ENVIRONMENTAL PROTECTION  
AGENCY,

Defendant.

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TRANSCRIPT OF MOTION HEARING (Video Conference)  
BEFORE THE HONORABLE ROYCE C. LAMBERTH  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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ALSO PRESENT:

JENNIFER HAMMITT, ESQUIRE  
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Environmental Protection Agency

Court Reporter:

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P R O C E E D I N G S

COURTROOM DEPUTY: Civil Action Number 12-1726,  
Landmark Legal Foundation versus the United States  
Environmental Protection Agency. Counsel, can you please come  
forward and identify yourself for the record.

MR. FERGENSON: Good morning, Your Honor. Arthur  
Ferguson, Ansa Assuncao, LLP, for Landmark Legal Foundation.

MS. GRAHAM-OLIVER: Good morning, Your Honor.  
Heather Graham-Oliver, representing the EPA in this matter.  
Also at counsel table is Jennifer Hammitt, counsel for the  
agency, and Kevin Miller.

MR. FERGENSON: Your Honor, also at counsel table  
for plaintiff and movant are Michael J. O'Neill, Richard Peter  
Hutchison and Matthew C. Foris, all of Landmark Legal  
Foundation.

THE COURT: All right. You may proceed.

MR. FERGENSON: Thank you, Your Honor. On  
Landmark's Motion for Sanctions, Landmark has attempted to  
fully brief the issues, many of which have been previously  
argued by me extensively before this Court. Landmark is also  
aware, as I am personally, that this Court took the available  
evidence and marshaled it carefully, considering what it felt  
was important and the inferences to be drawn therefrom in  
issuing its order directing that Landmark be entitled to take  
limited discovery in this case. In that regard, Landmark has

1 attempted to provide as full a record to this Court as  
2 possible, given this Court's prior actions in reviewing the  
3 record.

4           Almost none of what has been discovered would have  
5 been discovered or disclosed to Landmark or to this Court but  
6 for this Court's discovery order and this Court's marshaling  
7 of the evidence and then our actions, Landmark's actions, in  
8 taking discovery. And what we have found, very quickly,  
9 although we have attempted to marshal it in our papers, and I  
10 will say it quickly.

11           While this Court was told that -- and Landmark --  
12 that EPA always knew that our FOIA request covered the  
13 administrator and deputy administrator, and they did know  
14 that, but the advice given originally on what the deal was,  
15 and this the Court noted in finding questions that needed to  
16 be answered in its order ordering discovery. In reporting on  
17 the deal to the general counsel and others responsible for the  
18 FOIA request, the deal excluded, because it did not include  
19 the administrator or deputy administrator. Then when the  
20 search was sent originally to everyone but the FOIA  
21 coordinators for the administrator and deputy administrator,  
22 it similarly executed the administrator and deputy  
23 administrator.

24           If EPA always knew that the deal with Landmark  
25 included the administrator and the deputy administrator, then

1 the communication to the decision makers and to the FOIA  
2 communicators as to what to search for, excluding the  
3 administrator and deputy administrator both in the terms of  
4 the search and in the offices communicated with, was a  
5 falsehood. And given EPA's statement that it always  
6 recognized that it was a knowing and intentional falsehood by  
7 EPA. The effect was to shield at least for a 22-day period  
8 any review of the records of the administrator or deputy  
9 administrator.

10 In order to obtain relief from this Court, relief  
11 that was obtained, which was an extension of time to file the  
12 Motion for Summary Judgment, the EPA provided disclosure that  
13 included a nondisclosure of a material fact, which would have  
14 been relevant to a reasonable decision maker's conclusions as  
15 to whether to grant the relief. The test, as I understand it  
16 for nondisclosure, and I'm thinking of the 10b -- 10b-5 is  
17 that nondisclosure constitutes fraud on the decision maker  
18 when it would have been part of the decision maker's  
19 process -- whether it would have been a material part. What  
20 was not disclosed for the extension was that no search of the  
21 deputy administrator's file had ever been made.

22 Let me state now that at no time during these  
23 proceedings or in any of the material reviewed by Landmark or  
24 provided to this Court have we concluded that the Department  
25 of Justice has taken any improper action, and that includes

1 the conduct of Ms. Graham-Oliver, which has always been  
2 professional, correct, it has been a pleasure to work with  
3 her, as should be the case in opposing counsel. All these  
4 comments go to EPA and its employees who are responsible for  
5 the falsehoods placed before the record of this Court.

6 In order to defeat relief from this Court --

7 THE COURT: Before you get off on that track too  
8 far, it does bother me that statements that we now know were  
9 false, like that one, were not corrected with the Court. The  
10 Court, I understand, authorized this discovery, but the  
11 Government never came forward and admitted these things to the  
12 Court and withdrew things that were not true. I think that  
13 stands through today.

14 MR. FERGENSON: That's correct, Your Honor. And  
15 repeatedly before this Court in oral argument and in papers we  
16 have made that point. So, we've given them multiple chances  
17 to take away false statements that were submitted on the  
18 record and under oath before this Court.

19 THE COURT: They have not done so because I notice  
20 in the latest filings they have -- I mean, I just read  
21 Newton's deposition last night. Newton said nobody ever  
22 searched anything in the deputy administrator's files before  
23 April, which is five months, and yet they are still arguing  
24 that that is not true. Now we've got a deposition from Newton  
25 saying that, I'll hear their argument, but I don't understand

1 with Newton's testimony how they can take that position, do  
2 you?

3 MR. FERGENSON: I don't, Your Honor. It appears to  
4 me that they are operating on the -- it depends what "is" is  
5 type of interpretation of what constitutes a search.

6 THE COURT: That's not --

7 MR. FERGENSON: -- but they defined what a search  
8 is. In each of the filings they said this is what we did.  
9 No records response. We went to every office, and in every  
10 office they defined search as a no records response report or  
11 no responsive documents report or the documents. They said  
12 they got that response from everybody, but then at the last  
13 minute they found out that they may need to have done another  
14 search. That was false.

15 It was a false statement -- that for months we have  
16 said was a false statement. We said it in the depositions, we  
17 said it was a false statement. And you're right, Your Honor,  
18 there had been nothing received, and Mr. Wachter admitted that  
19 in his deposition. Mr. Newton also testified there had been  
20 no search that they're aware of of the deputy administrator's  
21 files at all. That would have been material. Now --

22 THE COURT: Well, in light of the deposition I read  
23 of the former administrator, she said the logical person who  
24 was dealing with Sunstein in the OIRA, the White House and  
25 OMB, the main person dealing on these subjects was the deputy

1 administrator, so his files would have been the most important  
2 of all to search and they didn't search them.

3 MR. FERGENSON: They did not search the deputy  
4 administrator at all until the fire drill -- what we called  
5 the fire drill events -- when it was within, I think, a little  
6 over 24 -- between 24 and 48 hours when they realized that no  
7 search had been accomplished, a string was provided and then  
8 they stood over -- I think Mr. Newton, and said -- and said,  
9 do this search, and they did the search. But there had been  
10 no search -- this Court was not told that when there was an  
11 extension. Whether this Court would have granted the  
12 extension or not is, under nondisclosure of material facts,  
13 irrelevant.

14 And the three declarations by Mr. Wachter contained  
15 materially false information designed to end this case without  
16 the thousands of documents they have provided. One of them  
17 was to oppose a preliminary injunction issued by this Court  
18 that we opposed. And what he did, what Mr. Wachter said is,  
19 we've issued a litigation hold. We are adhering to that  
20 litigation hold. We will do every action necessary to  
21 preserve documents. You do not need to issue this preliminary  
22 injunction. And this Court relied upon that. In fact, for  
23 two months nothing was done that was a falsehood.

24 I think this Court can infer from the record, not  
25 only in this case but from prior actions of EPA, that there



1 was never any intention to preserve documents as required  
2 under the litigation hold which covered ESI, electronically  
3 stored information, in personal devices, including  
4 BlackBerrys. No action was taken. In fact, that litigation  
5 hold was never sent to the administrator.

6           That was the second falsehood and they won. They  
7 won because they lied. I am reminded of a book that I still  
8 have on my shelf, which is Sissela Bok's *Lying* in 1978, the  
9 daughter of two Nobel Prize winners. And that's what this  
10 case is about. It is also, and I was reminded of this as well  
11 this morning, this Court can, and I would argue, ought to  
12 consider this case in the context of what happened now, I  
13 guess 14 years ago, it was 13 when this started, and as this  
14 Court recognized, provided an important predicate to this  
15 case, which is EPA's contemptuous non-preservation of  
16 documents during the transition.

17           THE COURT: Well, part of the --

18           MR. FERGENSON: It's part of the Samuel Beckett  
19 play where the actors repeat exactly the words that they said  
20 the first time through.

21           THE COURT: Well, part of what influenced me in not  
22 granting the preliminary injunction was the games EPA played  
23 14 years ago when they deliberately did not give my order to  
24 the key people to carry it out, and then the key people could  
25 not be held in contempt because they were never given my

1 order.

2           So, I thought the stay that the agency itself was  
3 willing to do was more likely to be carried out than any  
4 injunction I issued, in light of the games they have been  
5 playing with the Court.

6           MR. FERGENSON: And in this case, as opposed to  
7 that case, as we point out in our papers, EPA went to great  
8 lengths to try to get the documents back immediately. And as  
9 I think this Court -- as we've tried to lay it out -- we have  
10 tried repeatedly to get information from the EPA. What's  
11 happening? Where are the documents? What happened with this?  
12 E-mail after e-mail after e-mail that I sent requesting it.

13           And until the filing of the opposition to our  
14 motion we got nothing. We didn't know that all of the text  
15 messages and all of the e-mails on BlackBerrys had been erased  
16 between February 15th and 18th. It was accompanied before  
17 that with a warning. That is in the declaration. So that  
18 Mr. Wachter and his staff would have each received a warning  
19 that all of the ESI on these PDAs, on the BlackBerrys, would  
20 be gone as of February 15th to 18th.

21           And since they read and understood -- Mr. Wachter  
22 said, I understood it, my staff understands it, we're going to  
23 protect it. That said that forwarding is insufficient for a  
24 litigation hold. It comes to spoliation. They adopted it.  
25 Now, in the papers from EPA, they say, well, if we went too

1 far -- but they went what they thought they had to do under  
2 the circumstances, and they incorporated it in this case as an  
3 obligation that they undertook and presented to this Court.  
4 We didn't see that litigation hold.

5 In fact, it took two months from the Government --  
6 from EPA's pledge before this Court to provide the litigation  
7 hold to us for us to get it and repeated requests for it. The  
8 reason is, I think, that it shows that their principal  
9 defense, which is really a Federal Records defense, not a  
10 spoliation defense. They said, well, we forwarded everything.  
11 We would have forwarded everything. But as the litigation  
12 hold says, that is irrelevant.

13 Now, the Government periodically tries to make this  
14 a Federal Records Act case. It is not. If they had to  
15 preserve it or didn't have to preserve it before the date when  
16 spoliation obligations took hold is of no consequence. If it  
17 was there, then it had to be preserved. This is not an FRA  
18 case.

19 So, we have the knowing and intentional falsehood  
20 from the EPA about there having always considered -- they knew  
21 that the administrator and deputy administrator were covered.  
22 We have the knowing and intentional falsehood presented as a  
23 fraud on this court in the failure to disclose in the filing  
24 of no search of the deputy administrator's files, the search  
25 as they defined it, not a search as Ms. Shaw said, which is,

1 you know, the tree falling in the wilderness with no one  
2 there. They did not disclose that. They said they needed  
3 more time because there were, you know, they found that they,  
4 you know, it may have been inadequate. There was no search of  
5 the DA.

6           There was an intentional fraud on the Court when,  
7 in order to defeat the motion for preliminary injunction,  
8 there was a statement that a full search had been made but  
9 ultimately was inadequate, and that's why they needed more  
10 time and that's what they did. This was repeated in the  
11 declaration from Mr. Wachter, an intentional knowing fraud on  
12 the Court filed by EPA, also in pursuit of the Motion for  
13 Preliminary Injunction.

14           Except for the initial direction by Mr. Newton  
15 reporting on the deal that it only covered AAs, that it didn't  
16 include the administrator -- deputy administrator by its  
17 terms, every other piece of information was withheld from the  
18 Court, would not have been disclosed, except for discovery,  
19 and, I mean, they would have gotten away with it. They did  
20 not get away with it. And for that, this Court's order and  
21 our discovery in pursuit of that order, is responsible.

22           Now, in marshaling the evidence, the silos,  
23 although they intermingle, and I apologize for using the  
24 cliché of silo, in the lines of wrongdoing are spoliation,  
25 destruction of documents. Fraud on this court through false

1 communications, that after repeated advice in depositions and  
2 in argument before this Court, we have said: Correct it.  
3 Correct it. At some point, even if it was a mistake, and I  
4 don't believe so, hardens into an intentional fraud by EPA on  
5 this court.

6 And the delay, the delay that originally caused  
7 this Court to question the narrative provided by the EPA in  
8 its Motion for Preliminary Injunction. And the time line that  
9 we've tried to provide is that we had our FOIA request, it was  
10 limited, but never substantively. Let me also state that, and  
11 I've made this point before, Your Honor, the limitation by  
12 EPA as set forth in both Wachter declarations, that responsive  
13 documents were deemed to be only those documents where delay  
14 was for political reasons meant that no search had ever been  
15 done to respond to Landmark's FOIA request before the research  
16 that was agreed to by EPA. Not one. Because EPA, of course,  
17 would never do anything political, and that was their  
18 judgment. So they incorporated their interpretation of  
19 Landmark's motives into the search even though it wasn't in  
20 the terms of the search. No search was ever done, if a search  
21 is defined as finding and producing responsive documents.

22 Litigation hold on October 23rd, 2012.  
23 December 12th, Motion for Injunctive Relief. April 30th,  
24 Motion for Extension of Time to File, following the fire drill  
25 where they realized there had been no search at all of the

1 deputy administrator's documents. And May 15th, 2013, Motion  
2 for Summary Judgment with a follow-on reply, both containing  
3 declarations by Mr. Wachter.

4 THE COURT: Now, who was the person responsible for  
5 that phrase being inserted "for political reasons" in their  
6 terms of their search?

7 MR. FERGENSON: That was Mr. Wachter's declaration.  
8 Both of his declarations in connection with the Motion for  
9 Summary Judgment stated that responsive documents -- that the  
10 responsive documents would be produced where there had been  
11 delay of rules and regulations, where it was done for  
12 political reasons. The same three words were in both  
13 paragraphs.

14 THE COURT: That was --

15 MR. FERGENSON: Now, who ordered that, I don't  
16 know.

17 THE COURT: Okay. Mr. Wachter's, his position at  
18 the time?

19 MR. FERGENSON: Pardon me.

20 THE COURT: Mr. Wachter's position at that time?

21 MR. FERGENSON: Yes. And he, as the person  
22 responsible, I think he was head of OEX -- is that correct?  
23 He was head of OEX, it was his office, it was his  
24 responsibility, it was his declaration.

25 THE COURT: And he was in the administrator's

1 office?

2 MR. FERGENSON: Yes. I don't think he was in the  
3 immediate office, but he was in the administrator's office.  
4 The administrator's office was the administrator and the  
5 deputy administrator, and their personal staffs, including  
6 Mr. Dickerson and Ms. Shaw, who were the coordinators for FOIA  
7 requests for the administrator -- then administrator -- and  
8 for the then deputy administrator, both of whom have now moved  
9 on.

10 THE COURT: So, the bogus determination that it had  
11 to say "for political reasons" was by Mr. Wachter or someone  
12 above him?

13 MR. FERGENSON: Yes.

14 THE COURT: Was he asked?

15 MR. FERGENSON: Was he asked that? No.

16 THE COURT: Go ahead.

17 MR. FERGENSON: There has much discussion of -- I  
18 think, Your Honor, I mean, the defenses I think are few. I  
19 think I've dealt with the search. The search that didn't  
20 happen really did happen because Ms. Shaw who was, let's see,  
21 she was asked after the 22-day delay, she was sent the request  
22 to search. And, of course, the search was, if you remember  
23 this, we're not giving you search terms, these are some of the  
24 things you might look for, we're not giving you search terms.

25 Although, in the 24 to 48 hours during the fire

1 drill, general counsel's office, which had been earlier  
2 involved in this, and for good reason, given this Court's  
3 actions and the history with Landmark 14 years ago, everyone  
4 knew, and they knew or should have known, that took them --  
5 and they got a search string together.

6 Now, in the short period of time, I think it was  
7 about 36 hours, by memory, that Mr. Dickerson had after the  
8 22 days, what he did was, he went in to the administrator,  
9 Ms. Jackson, and said: Do you remember anything about this?  
10 And she said: No. No response. So, it was memory to  
11 Ms. Jackson. There was nothing from Ms. Shaw. And then as  
12 e-mails show -- in December? Tickled. Where is it? In  
13 January? Tickled: Where is it?

14 She sent an e-mail, you know, there's something --  
15 am I supposed to do something with the Landmark FOIA? And she  
16 gave -- there was a complete absence of an official no  
17 documents found or documents. She says she found documents  
18 but she couldn't figure out how to load them. So, the claim  
19 by Mr. Wachter to this Court in declarations that have the  
20 force of a sworn statement of truth to this Court today,  
21 months after his deposition, months after our filings, months  
22 after hearings in which I said: Are you going to substitute  
23 it? I didn't hide that argument before the EPA. It has not  
24 been claimed. He said: We got a response. This was our  
25 system. We got a response from everybody. It was either no



1 documents or documents. That was a lie.

2 Now, there's some discussion about spoliation,  
3 which is in the order of -- well, we don't know the relevance  
4 of the documents spoliated because they're not here and  
5 because we have the oral testimony that, you know, I didn't do  
6 this, or if I did it, and we have substantial testimony from  
7 the administrator, I complied with the Federal Records Act by  
8 forwarding everything into my secondary account, the Richard  
9 Windsor account. Not true.

10 When confronted with a document from her  
11 BlackBerry -- and this is the LisaPJackson@verizon.net,  
12 Exhibit 24 in our motion to our memorandum, and Exhibit 4 in  
13 the depositions. When she was confronted with sending an  
14 e-mail from her BlackBerry to eight people, including the  
15 current administrator, Gina McCarthy, but not to Richard  
16 Windsor. She said, well, I didn't send it to everybody. Even  
17 if I didn't send it to Richard Windsor, it went to eight or  
18 nine accounts. Which ones, we don't know.

19 What we do know is that she said she gave her --  
20 and this is at Pages 25 to 28 of her deposition. I didn't use  
21 text messages to do government business in general. My  
22 practice was to send things to the Richard Windsor account so  
23 they could be appropriately captured for government  
24 recordkeeping. Of course, the practice to avoid spoliation is  
25 to preserve them regardless of forwarding from the litigation

1 hold that, of course, was not sent to Ms. Jackson. The first  
2 one.

3 The second one after she left was purportedly sent  
4 to her. And that would have been after the BlackBerrys had  
5 been wiped between February 15th through 18th. All  
6 information in the BlackBerrys were wiped.

7 I don't recall -- also, there was no audit, there  
8 was no review of her personal e-mail practices or of her  
9 BlackBerry practices. She also testified that because text  
10 messages are sent, she talked about her government phone  
11 number. The Government phone number would have been used to  
12 send her text messages. How many people had it? Page 26.  
13 People in corporations, people in the environmental movement,  
14 people in government, people in non-profits, people in  
15 academia, my family. I have one phone number so if my kids  
16 wanted to call it, and we erred in including family and tying  
17 her next -- her continuation of that to the corporations,  
18 people in environmental movement, people in government, people  
19 in non-profits, people in academia. But all of these people  
20 had her e-mail.

21 She did not follow her practice in forwarding  
22 information from her BlackBerry, and all of the information  
23 resident in her BlackBerry was destroyed. We also note a  
24 finding in connection with FOIA. The very first sentence by  
25 Judge Collyer: Administrators of the EPA, a finding against

1 the EPA, have made prolific use of government issued Smart  
2 phones to send thousands of text messages.

3           Relevance. Spoliation can be presumed from bad  
4 faith or gross negligence. Relevance, likewise, it would be  
5 impossible for a party to prove the relevance of nonexistent  
6 documents. And what we have here is a pledge to this Court  
7 through the litigation hold that was secret until May, a  
8 pledge that we would follow the litigation hold and preserve  
9 all ESI that was potentially relevant on all personal devices  
10 in government hands.

11           And the relevance, because the substance was never  
12 reduced, the relevance was quite wide. It would include  
13 people in corporations, in environmental movement, in  
14 government agencies, her list was extremely broad. She said  
15 it was essentially the same list as for her e-mails, which was  
16 oodles, lots. It beggars the imagination, given what we were  
17 able to find, that it would not have included potentially  
18 relevant documents. Bad faith from all quarters.

19           The serial lies, the history of the actions from  
20 14 years ago, the failure to take remedial action that was  
21 taken 14 years ago, all point to the requisite bad faith, the  
22 requisite gross negligence and more, that show not only  
23 spoliation but relevance and importance. As I've told the  
24 Court before -- and I'd like to now turn to the relief.

25           The very purpose of the FOIA request was to find

1 documents that could have reflected the myriad -- the truth of  
2 the myriad of public reports. So, it's not a fishing  
3 expedition and it did not come from newspapers that one would  
4 have expected or news sources that one would have expected to  
5 go out of their way to support Landmark.

6           That there was a political agenda, whereby rules  
7 and regulations would be slow ruled in the run-up to the 2012  
8 election to enhance the reelection of President Obama. Well  
9 documented. We provided that. We cited to it. This was a  
10 reasonable request. And they kept it from, as this Court  
11 noted, the deputy administrator, who had the dealings with  
12 Mr. Sunstein at the White House and the administrator, who,  
13 when it was kicked up to her level, she would deal with them  
14 until all of the text messages, including any pleas for relief  
15 or pleas against relief from the environmental movement.

16           Why are you doing this? Are you trying to aid the  
17 election? We'll support him anyway, but don't do this to  
18 us -- were gone from her BlackBerry. Were gone because they  
19 were deleted en masse from her personal e-mail account, native  
20 on her home computer. Gone.

21           On remedies. The day that EPA, through  
22 Ms. Graham-Oliver, stated that they agreed -- said before this  
23 Court, they said they agreed to do another search and to  
24 negotiate the terms, was a sufficient change in position so  
25 that Landmark at that point would be entitled to, at this

1 Court's discretion, attorneys' fees and costs.

2 THE COURT: I agree.

3 MR. FERGENSON: If nothing more is imposed on EPA  
4 then -- and this is not a Federal Records Act case, so you  
5 know, that they are going to do better with a Federal Records  
6 Act is irrelevant. Something more has to be followed,  
7 otherwise they get a free pass. It's free. They can spoliage  
8 because, as the Government -- as EPA notes, relying on this  
9 Court's opinion in Alexander, there can be no monetary  
10 sanctions against EPA itself other than explicitly provided  
11 through a waiver of sovereign immunity through attorneys' fees  
12 and costs. And we can only have one reasonable set of the  
13 attorneys' fees and costs.

14 Now, what other sanctions would be available that  
15 do not involve monetary sanctions? An order of spoliation.  
16 Finding that spoliation occurred with a detailed, as this  
17 Court did, you know, in its prior order, detailing the reason  
18 for the spoliation order so that the world might know. And  
19 that's not going to change EPA's attitude, and it doesn't  
20 really help us. Although, it may help other litigants.

21 We believe that this Court, under these  
22 circumstances, extraordinary circumstances, including the  
23 vouching of the truth of intentional falsehoods by not  
24 removing them from the Court file would be to provide the  
25 equivalent of what the Court could do if Landmark were seeking

1 anything but the documents, which is the default judgment.

2 The ultimate, you know, the death penalty in cases. We can't  
3 get a default judgment.

4 We can get summary judgment, but that would leave  
5 us only with attorneys fees and costs, but we can get a  
6 finding that under these circumstances, insulating the  
7 administrator and deputy administrator, the background -- as  
8 this Court noted of the administrator and deputy  
9 administrator's central role in dealing with the issues that  
10 we were focused on, a finding that EPA engaged in the practice  
11 or that these stories were true, that there was a delay of  
12 rules and regulations for the purpose of aiding the election  
13 of the President.

14 It didn't mean that the President was responsible  
15 for it, but it does mean that the EPA, as an equivalent of  
16 what I believe we would be entitled to if monetary damages  
17 were a remedy. That's the death penalty remedy.

18 THE COURT: Well, let me ask you. On that point,  
19 have you received in discovery anything that actually supports  
20 a factual finding that that's what happened regarding EPA's  
21 reasons for their decision-making and the lead-up to the  
22 election?

23 MR. FERGENSON: We received our last omnibus  
24 production on January 8th of this year, 4,256 pages. In the  
25 review to date we have not found any such document.

1 THE COURT: Okay.

2 MR. FERGENSON: It is an extraordinary finding, but  
3 in the absence of any other default relief, we would ask that  
4 this Court consider that relief. Then we would ask that this  
5 Court direct EPA, another nonmonetary sanction, to advise all  
6 other parties in litigation with EPA since 2009 of the finding  
7 of this Court of spoliation, if their rights have been  
8 deprived. If they were in discovery and they were told no  
9 documents exist in litigation, including FOIA litigation, they  
10 should be informed. And they should conclude whether any  
11 settlements entered into or judgments entered against them are  
12 subject to reopening because of the practice of spoliation.

13 That is also a nonmonetary sanction. Then we come  
14 to the vindication of the power of this Court. Under Shepherd  
15 and under this Court's opinion at 272 F.Supp 2d 70, et seq.,  
16 the prior case, this Court says or wrote: This Court has the  
17 inherent power to protect its integrity and to prevent abuses  
18 of the judicial process by holding those who violate its  
19 orders in contempt and ordering sanctions for such violations.

20 Ordering EPA in contempt, civil contempt, would  
21 provide some vindication of this Court, but it didn't work  
22 last time and it doesn't get us anything. It is a pinprick.  
23 The other option under the inherent power --

24 THE COURT: There was a day when contempt of court  
25 was a serious offense, but that day seems to have come and

1 gone for the Government.

2 MR. FERGENSON: It has.

3 THE COURT: At least in my court.

4 MR. FERGENSON: The other is under the inherent  
5 power of the Court under Shepherd and under Landmark versus  
6 EPA is criminal contempt. Under the Rules of Criminal  
7 Contempt under the inherent power, neither Landmark can  
8 prosecute, nor in this case since the defendant is the  
9 Government represented by the Department of Justice, the  
10 Government could not prosecute.

11 This Court would then have to appoint an  
12 independent prosecutor to determine whether criminal sanctions  
13 would be appropriate. It is an extremely difficult -- it's  
14 difficult to ask for. I have never asked for it. I think it  
15 would be -- it's within the very limited reliefs that are  
16 appropriate for this court. It could embrace an investigation  
17 and possible prosecution for criminal contempt of those people  
18 who were personally responsible, criminally responsible, if  
19 any, for the intentional knowing falsehoods placed by EPA  
20 before this Court and vouched for through today. It would be  
21 an extraordinary step to take.

22 I don't think I'll be around 14 years from now when  
23 the Beckett play repeats itself again. I regret this. All we  
24 wanted was our documents. And I fear that in the absence of  
25 something, you know, that this Court has dealt with affronts



1 to its integrity before and it's aware of the tools that it  
2 has to vindicate its authority. I think here the number, the  
3 sequence, the purpose that can be discerned from this, the  
4 protection is -- and the history is extraordinary. We say  
5 this with regret.

6           There were not only -- this is EPA -- a number of  
7 the individuals are lawyers, that is also mentioned in  
8 Shepherd. And an investigation by a prosecutor -- independent  
9 prosecutor named by this Court to vindicate its authority  
10 under the criminal contempt could, in its review, consider  
11 their actions. I believe that the prosecutor could assert  
12 that the crime fraud exception is available to find out who  
13 told what to whom, and to try to penetrate the -- I was told  
14 this by that person and I relied upon this.

15           I do not think EPA's attitude toward this Court --  
16 it certainly didn't change during the course of this  
17 litigation -- that EPA's attitude to Landmark has not changed  
18 over 14 years. EPA -- I know I've said this before to the  
19 Court -- and I was a prosecutor, I was in the Executive Branch  
20 for a period of time, I served as a clerk in the Judicial  
21 Branch, every person and entity that stands before the  
22 Government seeking its rights deserves respect regardless of  
23 what their political views are.

24           I think Landmark was treated as the enemy in this.  
25 It may be a reflection of traits that are general in society.

1 But when we come in front of a court, we are no longer the  
2 enemy, and we should not have been the enemy in EPA. Our  
3 disagreements will be played out in the process, and this  
4 Court should have been treated with a great deal of respect.  
5 I regret this. I would have rather had the documents and not  
6 be standing here in front of the Court today. Thank you, Your  
7 Honor.

8 THE COURT: Let me ask you a couple of other  
9 questions. One is on that idea that you seem to agree with  
10 what I first said about vouching with these, but not  
11 withdrawing the oral statements. Do you have any research or  
12 any case law on that that would help me in looking at that  
13 question?

14 MR. FERGENSON: No, Your Honor, beyond the -- I can  
15 try to find it, but I believe that there's a general  
16 obligation before courts to correct any misstatements, and it  
17 may fall under the general rubric. We can try to find it.  
18 Now, what I did, Your Honor, I placed on the record both at  
19 depositions and at hearings before this Court, if memory  
20 serves, stating that they had not corrected it and urging them  
21 to correct it.

22 THE COURT: Yes, you did. But I guess in light of  
23 my inability to put my finger on some case law on that, and  
24 maybe I'm going to create some, but maybe you can help me  
25 create it. That is very troubling to the Court. That even if

1 you're no longer relying on the present motion, that you can  
2 just leave a false affidavit on file with the Court and do  
3 nothing about it. That troubles me.

4 MR. FERGENSON: Yes, Your Honor. And here, not  
5 only was -- as this Court knows, I talk a lot, and I don't try  
6 to hide my strategy, and I put that on the record. I said:  
7 This is false. I put it on the record in hearings. I said --  
8 at the last hearing, I think -- I think there were two or  
9 three before this, I said, they have left it on file. They  
10 were given notice. That, to my mind, when I said they've not  
11 changed it, so they are re-upping. They are vouching. I  
12 think that adds to this.

13 I think there's a general obligation of a litigant  
14 to be appropriate with the Court and to correct mistakes. I'm  
15 sure this Court has had litigants before it who have said:  
16 I was wrong. This affidavit was incorrect. I'm substituting  
17 an affidavit. I think that's the best way to do it and I  
18 think there's an obligation -- a general obligation. And to  
19 leave an affidavit after its been shown to be false and  
20 pointed out that it's been left constitutes an endorsement or  
21 a vouching of the fraud.

22 I don't know, have we -- we can look further and  
23 find authority. And I think that it is support of -- it  
24 certainly shows bad faith. It certainly shows that Landmark  
25 has given them and this Court has given them every opportunity

1 to come clean and they haven't.

2           Again, this is not the responsibility of the  
3 Department of Justice, this is all EPA -- always EPA. And  
4 they were present, it's been on the record, that by not  
5 correcting it -- we said, correct it, and they chose not to.  
6 Not one. Not the filing with this Court when they got the --  
7 when they got the extension, with the material nondisclosure  
8 which constituted a fraud in this court. Not the denial of  
9 the preliminary injunction.

10           So, they had the opportunity to wipe clean the  
11 BlackBerrys of all native information e-mails and text  
12 messages and not the declarations that they filed and left in  
13 place by Mr. Wachter, the three declarations by him. First  
14 for the -- we're doing everything we can, Your Honor, we're  
15 going to abide by the litigation hold. And then the other  
16 two, which is, we really have done it. When it was  
17 inadequate, we found out about it, and we went back. Those  
18 two, to get summary judgment, which if this Court had not  
19 acted would have ended the process. Everything would have  
20 been secret.

21           Everything would have been not disclosed, including  
22 the litigation hold, including the wiping of the text  
23 messages, which was only disclosed now, even though we asked  
24 again and again. Everything would have been fine. The enemy  
25 would have been kept out of the gates, Landmark being the

1 enemy.

2 THE COURT: Now --

3 MR. FERGENSON: And, as it came, this Court as  
4 well.

5 THE COURT: Now, one other question. What has  
6 happened since the last filing? Is there now a search you all  
7 are agreeing on or what is the status of that?

8 MR. FERGENSON: After extensive negotiations,  
9 search terms and protocol -- or search protocol was agreed to.  
10 There were delays. So far upon -- there was a production --  
11 there was a briefing book production on August 29, 2014, it  
12 wasn't briefing books, it was 108 pages. The daily reading  
13 files from the administrator consisting of letters to  
14 administrator from outside groups on actions or pending rules,  
15 including the American Lung Association, State Department of  
16 Environmental Quality and others.

17 There was a briefing books production which didn't  
18 actually have briefing books. On September 20th, 2014,  
19 755 pages talking points for meetings with group outside of  
20 the EPA, background information on individuals meeting with  
21 the administrator, reports by outside groups for the  
22 administrator to read, and letters from outside groups and  
23 proposed pending rules.

24 For example, the City of Albany's Mayor writing to  
25 express support for the Mercury Air Toxic Standards. There

1 was a notice luxe production, a full set, of what they  
2 considered responsive of 3,304 pages. Also, on  
3 September 20th, paper and other files of 89 pages, and a  
4 Vaughn index of 828 items. In our review -- to date of the  
5 January 8th production, this month of 4,256 pages. We have no  
6 basis to believe that that review is ongoing.

7           We have no basis to believe or to assert that that  
8 was not a production that complied with the protocol. Of  
9 course, it excluded all of the documents that had been  
10 destroyed, including all the text messages -- including all  
11 the text messages from Gina McCarthy, which was in Judge  
12 Collyer's decision, she was one of the senior administrators  
13 during this period of time, and all of hers were destroyed,  
14 thousands and thousands of text messages. We have cited to  
15 her opinion, and they were gone as well. And they weren't  
16 all -- it is not reasonable to assert that they were all  
17 e-mails with personal friends setting up luncheon  
18 appointments, family or alumni get-togethers.

19           They were in the business of communicating. And to  
20 give Administrator Jackson credit, she wanted an open  
21 government. That was her belief. That was her philosophy.  
22 And she practiced that. If you're going to have open  
23 government where you give your telephone number so you can get  
24 texts from hundreds of people and e-mails from hundreds of  
25 people, then there is a concomitant responsibility that should

1 have been institutionalized, especially after the commencement  
2 of the litigation.

3 And before I end, one point that I want -- that we  
4 make in our briefs. The documents that were not preserved  
5 included any documents that were text messages or e-mails  
6 reflecting the adequacy of the search. We got some. We got  
7 the initial instruction. This is our deal, it covers AAs and  
8 ADAs and these other people. We had that Newton memo. We  
9 have the instruction to everybody but the administrator's  
10 assistant, administrator's FOIA coordinator or the deputy  
11 administrator's FOIA coordinator. This is what it covers,  
12 this is how you search, but it only covers these same people  
13 then covered the administrator or DA. We have those.

14 But what we don't have is the evidence that would  
15 be included -- excuse me, Your Honor -- in the text messages,  
16 in the e-mails that were destroyed, sometimes en masse, of  
17 other actions of wrongdoing, and this Court can rely upon that  
18 as well -- and asked for that production, and that production  
19 was relevant to the underlying determination of a good faith  
20 adequate search. Those documents weren't preserved. So, it's  
21 not only the merits, but it's the adequate search. There are  
22 two prongs to the documents destroyed.

23 THE COURT: All right. Thank you, Mr. Fergenson.

24 MR. FERGENSON: Thank you, Your Honor.

25 THE COURT: If you want to, the Government, before

1 you start, if you want to take a brief recess for everyone's  
2 convenience, we can do that?

3 MS. GRAHAM-OLIVER: Yes, Your Honor, I would  
4 appreciate that.

5 THE COURT: We'll take a short recess.  
6 BRIEF RECESS AT 10:38 A.M.

7 AFTER RECESS

8 MS. GRAHAM-OLIVER: Thank you. Your Honor, the  
9 motion in front of the Court is about spoliation, and Landmark  
10 has the burden of proving spoliation. To do so, Landmark must  
11 establish that the EPA destroyed evidence that was relevant to  
12 the parties' claim; two, caused Landmark prejudice; and,  
13 three, was done with a culpable state of mind. Landmark has  
14 not carried its burden on any of these elements.

15 On relevance, Landmark has not pointed to and  
16 cannot point to any evidence showing that the EPA destroyed  
17 documents that would have been responsive to Landmark's FOIA  
18 request. This is true both with respect to subject matter,  
19 i.e., one, communications from outside groups regarding  
20 proposed regulations; and, two, delay of regulations because  
21 of the upcoming 2012 elections, as well as time period,  
22 January to mid-August 2012.

23 In fact, all available record evidence indicates  
24 that no such documents ever existed either on personal e-mail  
25 accounts or as text messages. On prejudice, Landmark cannot



1 point to anything concrete. Even assuming the destruction of  
2 relevant documents, Landmark has not articulated how it was  
3 prejudiced by this destruction. For example, the destruction  
4 of a personal e-mail would not be prejudicial if the same  
5 e-mail was also captured in agency systems, as was EPA's  
6 policy and as individual employees have testified in doing.

7 Similarly, the destruction of text messages would  
8 not be prejudicial given the likelihood that whatever  
9 substance was being discussed would likely be captured in some  
10 other agency system as well. The consistent testimony has  
11 been that text messages are inherently not well-suited to  
12 conduct business as proven by the BP Oil spill text message  
13 that was discussed in the deposition testimony of Ms. Lisa  
14 Jackson.

15 On culpable mental state, Landmark offers no basis  
16 for concluding that any individual EPA employee acted in bad  
17 faith. Landmark spends a significant amount of time rehashing  
18 over and over and over again issues related to the past  
19 processing of Landmark's underlying FOIA request. Those  
20 mistakes do not rise to the level of bad faith conduct  
21 warranting sanctions.

22 The EPA has corrected any errors made in the first  
23 search and has agreed to a new search, has conferred with  
24 Landmark about the search terms and scope, and has produced  
25 records as a result of this new much wider search. There's no

1 indication that things were lost or destroyed --

2 THE COURT: Is that search --

3 MS. GRAHAM-OLIVER: -- in the interim.

4 THE COURT: Is that search now completed?

5 MS. GRAHAM-OLIVER: I'm sorry.

6 THE COURT: Is the new search now completed?

7 MS. GRAHAM-OLIVER: The new search is completed,  
8 Your Honor. The issues related to the past processing of  
9 records are not relevant to the present spoliation motion, nor  
10 do they cast doubt on the EPA's good faith. The sworn  
11 testimony of both Ms. Jackson and Mr. Perciasepe is that text  
12 messaging was not used for substantive business purposes.

13 Lisa Jackson testified that she did not nor would  
14 she violate federal recordkeeping requirements. It was her  
15 practice to ensure that she did everything she could to comply  
16 with federal laws to ensure that records were managed  
17 properly. She testified that it was her responsibility to  
18 ensure that she did not do anything that would hinder the  
19 efforts of the offices to perform their functions under all  
20 the records requirements that they had to adhere to.

21 In light of that --

22 THE COURT: She also testified --

23 MS. GRAHAM-OLIVER: -- she did not think it  
24 appropriate to use text messages.

25 THE COURT: She also testified that no one ever

1 told her that she had any obligation to forward this stuff  
2 from her PDA or text messages. She ended up doing some of the  
3 PDA and none of the texts, as I understand it. I'm less  
4 troubled by the text messages, I will say, than I am with  
5 things on their BlackBerrys because that could be full text --  
6 e-mails that would be much more troublesome.

7 And your argument that they can't prove what was  
8 destroyed, why is it their burden to do it? The burden is on  
9 the agency when you don't produce something that is requested  
10 under FOIA. Why isn't it your burden to show what you  
11 destroyed.

12 MS. GRAHAM-OLIVER: Two things, Your Honor. On the  
13 BlackBerry, the only thing that would have been destroyed  
14 would have been the text messaging because the e-mails were on  
15 EPA servers. Those were never wiped or destroyed.

16 THE COURT: Not if it was her personal e-mail.

17 MS. GRAHAM-OLIVER: Her personal e-mail -- she  
18 testified that whenever her personal e-mail may have been used  
19 in any way, she would forward those personal e-mails into an  
20 EPA account. That was her sworn testimony.

21 THE COURT: Okay. That's one employee. How about  
22 all the others who corresponded by PDA on personal e-mails  
23 about agency business? Have they ever been asked if they  
24 agree with what she did and they did what she did? Does  
25 anyone know? Are you saying that's the plaintiff's obligation

1 to go find that out?

2 MS. GRAHAM-OLIVER: In spoliation, Your Honor, it  
3 is the plaintiff's burden to find -- the plaintiff has to  
4 carry the burden of proof in the spoliation action, Your  
5 Honor.

6 THE COURT: All right. You want me to authorize  
7 him to take depositions of all those people now, because it's  
8 his burden to prove that somebody didn't send their personal  
9 e-mails in?

10 MS. GRAHAM-OLIVER: No, Your Honor. We have a  
11 declaration from the FOIA records individual who has spoken  
12 with these individuals, and said that in fact it was their  
13 practice as well to forward any e-mails on their personal  
14 account into an EPA account. And, in fact, that is how we got  
15 here today. That's because they in fact did do that and there  
16 were e-mails with personal e-mail accounts, but they had been  
17 forwarded into EPA accounts. And there is no evidence that  
18 Landmark has unearthed that would be contrary to that.

19 THE COURT: What affidavit are you talking about?

20 MS. GRAHAM-OLIVER: I'm talking about the affidavit  
21 of Larry Gottesman, it was attached to our opposition motion.

22 THE COURT: Go ahead. If you want to get that.

23 MS. GRAHAM-OLIVER: He spoke with 17 senior  
24 officials, and he received information from each senior  
25 official regarding the use of text messaging or personal

1 non-agency e-mail accounts. Each individual was asked whether  
2 to the best of their recollection they used text messaging to  
3 send or receive information about rules or rule making in  
4 January through August 2012, or if they used personal e-mail  
5 accounts to send or receive information about rules or rule  
6 making in January through August 2012.

7           Individuals either met with him personally,  
8 contacted him by phone or sent him an e-mail. All senior  
9 officials questioned replied that to the best of their  
10 recollection they did not use text messaging to discuss rules  
11 or rule making in January through August 2012. A few  
12 officials indicated that they would use their personal e-mail  
13 account for business purposes if remote access to the agency's  
14 server was not operating or if there was a need to print at  
15 another location, such as at home.

16           However, these officials all stated that the  
17 records were captured in EPA's Lotus Notes e-mail system,  
18 either because they were forwarded into the EPA's system  
19 consistent with the EPA's policy or already in EPA's system if  
20 sent from the employee e-mail address to a personal e-mail  
21 address for printing.

22           THE COURT: All right.

23           MS. GRAHAM-OLIVER: There is no evidence that --

24           THE COURT: Was he deposed?

25           MS. GRAHAM-OLIVER: No, he wasn't, Your Honor. He

1 was not deposed. And, Your Honor, neither was -- Landmark  
2 decided that they were not going to depose Nina Shaw either.  
3 Now, it is absolutely incorrect that there was a material  
4 misrepresentation with respect to Eric Wachter's affidavit.  
5 Mr. Wachter testified to what he knew at the time, not what  
6 Mr. Newton knew, but what he knew at the time.

7 And what was it that he knew at the time? He knew  
8 at the time that there was something amiss about the search  
9 because the program offices had returned e-mails pertaining to  
10 the administrator, and yet there was a no response in the  
11 administrator's office. That was what he knew at the time.  
12 And as a result, a supplemental search was done. A  
13 supplemental search of everybody was done. The search was of  
14 the administrator, the deputy administrator and the chief of  
15 staff's office.

16 Now, this supplementary search indicates that there  
17 was good faith on the part of the agency. It was done prior  
18 to the motion for summary judgment being filed. It does not  
19 indicate that there was any lying, there was nothing to hide.  
20 What was evident was that Mr. Wachter was aware that another  
21 search was necessary, and in fact, it was accomplished.

22 If the Court desires any supplemental briefing on  
23 this issue we will be glad to accommodate that. But the  
24 evidence is that Mr. Wachter signed a declaration with respect  
25 to what he knew at the time.

1 Ms. Jackson -- the testimony --

2 THE COURT: I'm sorry. So, therefore, you have no  
3 reason to withdraw his affidavit because you believe it is  
4 true? That's your position?

5 MS. GRAHAM-OLIVER: My position, Your Honor, is  
6 that Mr. Wachter believed that it was true at the time that he  
7 signed the declaration.

8 THE COURT: He now knows it was not true, correct?

9 MS. GRAHAM-OLIVER: No. Mr. Wachter's declaration  
10 in Paragraph 15 states that the initial document collection  
11 was closed on January 25, 2013, and this is Document 5510, it  
12 was filed September 12th, 2014, and it's on Page 7, Paragraph  
13 15. He states: The initial document collection was closed on  
14 January 25th, 2013. At that point my office had either  
15 received a no records response or had coordinated the  
16 collection of documents from the immediate office of the  
17 office of the administrator and from assistant administrators,  
18 deputy administrators and chief's of staff in the EPA's office  
19 of water, et cetera, et cetera.

20 When he says that he received either a no records  
21 response, that was with respect to Eric Dickerson and the  
22 administrator's records. When he talks in terms of he had  
23 coordinated -- his office had coordinated the correct  
24 collection of documents from the office of -- from the  
25 immediate office of the office of the administrator, this is

1 true. What had happened was that Eric Wachter knew that  
2 Mr. Newton had sent a request to former deputy administrator,  
3 Bob Perciasepe's office, asking for records, and he had sent a  
4 request to the chief of staff's office asking for records on  
5 November 14th, 2012.

6 THE COURT: But he's saying that there was a no  
7 response from the deputy administrator, but Newton testified  
8 no one asked the deputy administrator and there was no search  
9 at that time.

10 MS. GRAHAM-OLIVER: Newton testified that to the  
11 best of his knowledge at the time a search had not been done  
12 of the deputy administrator's office.

13 THE COURT: All right.

14 MS. GRAHAM-OLIVER: But whether Eric Newton knew  
15 that at that time is not clear, and in fact, I don't believe  
16 he did know that.

17 THE COURT: You're saying he did not make up,  
18 someone told him to lie, that the deputy administrator had  
19 been searched. So, he wasn't lying, someone else told him  
20 that and it was a lie? What are you saying?

21 MS. GRAHAM-OLIVER: No, I'm not saying that. I'm  
22 saying that he testified to what he knew at the time. That's  
23 all I'm saying. At the time --

24 THE COURT: If he testified --

25 MS. GRAHAM-OLIVER: -- in an affidavit to what he



1 knew.

2 THE COURT: He testified the deputy administrator's  
3 files had been searched; that's what he said. The office of  
4 the administrator, which included the deputy, had been  
5 searched. That's what he said and that is false. Am I right?

6 MS. GRAHAM-OLIVER: Well, at the time Nina Shaw --  
7 and she has not been deposed -- but Nina Shaw sent an  
8 affidavit, signed an affidavit, saying that she had searched  
9 the deputy administrator's office in January.

10 THE COURT: That's not what Mr. Newton says.

11 MS. GRAHAM-OLIVER: Mr. Newton was not aware of the  
12 search.

13 THE COURT: You don't want to admit that that's  
14 false. You don't want to admit Wachter's affidavit is false.  
15 Fine. We'll see where we go with that. Go ahead. What's  
16 your next argument about false affidavits?

17 MS. GRAHAM-OLIVER: Your Honor, the EPA's Office of  
18 the Inspector General investigated EPA's practice and  
19 procedure with regard to the use of personal e-mail accounts  
20 and determined that there was no evidence to support the claim  
21 that EPA used, promoted or encouraged the use of private  
22 e-mail accounts to circumvent records management  
23 responsibilities.

24 THE COURT: If you want to rely on that, is there a  
25 reason you haven't given it to the Court?

1 MS. GRAHAM-OLIVER: The reason that we haven't  
2 given what to the Court?

3 THE COURT: The IG report to the Court.

4 MS. GRAHAM-OLIVER: It was produced in discovery,  
5 Your Honor.

6 THE COURT: Well, that doesn't do me any good, does  
7 it? You haven't filed it.

8 MS. GRAHAM-OLIVER: Okay. I can produce that to  
9 you, that's no problem.

10 THE COURT: If you're going to rely on it, you  
11 better.

12 MS. GRAHAM-OLIVER: Okay. In addition, Your Honor,  
13 Ms. Jackson stated that, you know, when she was asked about  
14 any communications between the Office of Information and  
15 Regulatory Affairs and herself and whether those  
16 communications were in writing, her quote is found on Page 20  
17 of our opposition, but specifically she says there was never a  
18 memo or anything that said that for these reasons, which those  
19 reasons were for political reasons, we are not going to  
20 approve this rule for political reasons.

21 Mr. Perciasepe testified that OIRA never indicated  
22 to him in his calls or his meetings that -- please don't do  
23 this rule because somebody in the White House told me to do it  
24 or not to do it. That never happened. That's the record --  
25 that's the testimony in this case. There's no other testimony

1 that we can assume occurred.

2 THE COURT: Now, to be clear about that question,  
3 I was asking you before -- since it seems you want to have a  
4 trial, you don't want to concede that the deputy administrator  
5 was not searched for five months. You're claiming today the  
6 deputy administrator was searched in January, that's what your  
7 claim is today?

8 MS. GRAHAM-OLIVER: Yes, Your Honor.

9 THE COURT: All right. And Mr. Newton's --  
10 Mr. Newton's testimony at his deposition is wrong?

11 MS. GRAHAM-OLIVER: Your Honor, Mr. Newton was not  
12 aware of the search because the records were not uploaded in  
13 the database. And as Ms. Shaw testified, she had problems  
14 with uploading the records to the database. She contacted a  
15 program office and asked how best to search for the records in  
16 January. They sent her their search and how they did that  
17 search, and she duplicated that search. But she testified in  
18 her affidavit she was having problems uploading those records,  
19 and that's why Mr. Newton testified that to his recollection  
20 he did not see any documents on the database with respect to  
21 the deputy administrator's records.

22 But, Your Honor, there's no evidence, again, that  
23 the deputy administrator's records were spoliated. Those  
24 records were there. They were produced in the production on  
25 May 15th. There's no evidence in the record to indicate that

1 there was any spoliation of the deputy administrator's  
2 records.

3 THE COURT: I thought their representation was that  
4 in moving for the enlargement of time with me a false  
5 statement was made that there had been a search of the deputy  
6 administrator and that was not true?

7 MS. GRAHAM-OLIVER: Your Honor, again, we can  
8 provide supplemental briefing on that issue, if you desire.  
9 But our position is that Mr. Wachter at the time testified to  
10 what he knew to be true, and his focus at that time was,  
11 again, on the no response -- the no response from the office  
12 of the administrator.

13 THE COURT: Go ahead.

14 MS. GRAHAM-OLIVER: And, again, Mr. Newton only  
15 testified to what he knew as well. The spoliation -- the EPA  
16 also has done a more recent third search that was accomplished  
17 that included 72 unique specific search terms that were  
18 mutually agreed upon. And as Landmark has stated, it took  
19 some time to negotiate those terms, but the EPA basically --  
20 and Landmark came out with a search term that included those  
21 72 unique terms and went forward and has completed the search  
22 and the production under the third search, which again  
23 evidences that there was no spoliation of the records. The  
24 records that were on the EPA system remained on the EPA  
25 system. There's no spoliation of those or any other records

1 for that matter.

2 Ms. Jackson testified, yes, that she gave out her  
3 cell phone number to oodles of people, but that was so, in her  
4 testimony, that they could call her. She wanted people to  
5 call her because she believed that as a public servant, being  
6 accessible to people she served, was important. She did not  
7 conduct business, though, through her BlackBerry or through  
8 text messaging.

9 The litigation hold that was sent in October and  
10 then again in August indicates that was an indication of good  
11 faith. The litigation hold was not ignored. There was no  
12 reason to believe that any responsive documents were on the  
13 BlackBerry, and those responsive documents would have been  
14 texts on the BlackBerry or within personal e-mail accounts  
15 that were not forwarded into the agency accounts. Since there  
16 was no reason to believe that any relevant responsive  
17 information was in a BlackBerry or personal account that was  
18 not in an agency account, there was no reason to ask to search  
19 those locations or to hold them. The scope of the litigation  
20 hold was for relevant responsive information.

21 THE COURT: Well, I compared the October 23rd  
22 litigation hold to the August 20th, 2013 litigation hold, and  
23 I did note that in the later one the agency did preserve --  
24 indicate that the general counsel reiterated, you must  
25 preserve all communications, and our records related to this

1 FOIA request in your possession and control, including any  
2 records and personal e-mail accounts or on personal devices  
3 that document agency business or relate to your work on agency  
4 rule making activities.

5 That's very helpful and very worthwhile to put in  
6 that level of detail, but that was not in the original  
7 litigation hold, the wording was much more ambiguous, right?

8 MS. GRAHAM-OLIVER: Well, Your Honor, yes. The  
9 wording in the initial litigation hold was different than the  
10 second litigation hold. However, the agency's policy with  
11 respect to personal e-mails was that if there was any agency  
12 business that was done on personal e-mails it was to be  
13 forwarded to agency accounts. And that is why the agency  
14 accounts were the ones that were searched.

15 THE COURT: Where was that requirement?

16 MS. GRAHAM-OLIVER: That is in -- let's see. Your  
17 Honor, in June of 2013 the EPA issued the Interim Records  
18 Management Policy where EPA also provides -- which provided  
19 that those records should be forwarded into EPA accounts.

20 THE COURT: But in October 2012 there wasn't any  
21 such requirement?

22 MS. GRAHAM-OLIVER: It was more or less a practice  
23 of the individuals, particularly the high level individuals.  
24 Ms. Jackson and Mr. Perciasepe both testified that that was  
25 their practice in October 2012 and preceding that that had

1 always been their practice. So, there isn't any other  
2 evidence that would contradict that. That was their practice  
3 all along.

4 THE COURT: Of those two.

5 MS. GRAHAM-OLIVER: And from what we know, with  
6 respect to the 17 other assistant administrators in the  
7 program offices, they, too, had that practice.

8 THE COURT: All right. In 2012?

9 MS. GRAHAM-OLIVER: In 2012, Your Honor. Your  
10 Honor, also, EPA has filed a supplemental notice of --

11 THE COURT: I saw that. So it's now the law.

12 MS. GRAHAM-OLIVER: It's now law, yes. So, as you  
13 know, on November 26th, 2014, the President signed into law  
14 the Presidential and Federal Records Act Amendment of 2014.  
15 And this new law clarifies the responsibilities of federal  
16 government employees when using nonofficial electronic  
17 messaging accounts for government business. And that approach  
18 codifies EPA's approach to using such accounts in the conduct  
19 of agency business, as captured in EPA's June 2013 Interim  
20 Records Management Policy.

21 And, as testified to in this case, including the  
22 practice of forwarding information from nonofficial electronic  
23 messaging accounts to official accounts. The EPA is intending  
24 also to update its Interim Records Management Policy to  
25 include the 20-day limit that is specified within the Act.

1 The EPA also intends to update employee training and guidance  
2 to include the new time limit and other provisions of the Act.

3 In the 2012 and 2013, EPA required all employees to  
4 take mandatory records management training and plans to  
5 continue this annual training requirement. The agency has  
6 always instituted a quarterly records management day with  
7 reminders sent by the office of the administrator and the  
8 acting chief information officer to promote good records  
9 management practices and to highlight specific issues.

10 In June of 2013, the EPA issued the Interim Records  
11 Management Policy --

12 THE COURT: Where do I find it?

13 MS. GRAHAM-OLIVER: -- EPA also provides individual  
14 records training to political appointees when they join the  
15 agency. The Office of Inspector General performed an audit of  
16 EPA's practices with regard to personal and secondary e-mail  
17 accounts and found that there was no evidence that EPA was  
18 using these accounts to circumvent FOIA.

19 The Office of Inspector General is now initiating  
20 an audit based upon a request from Congress of US EPA  
21 processes for preserving text messages.

22 THE COURT: Where do I find the interim policy?

23 MS. GRAHAM-OLIVER: The interim policy was attached  
24 to the Motion for Opposition.

25 MR. HAMMITT: I believe so.



1 THE COURT: To the opposition?

2 MS. GRAHAM-OLIVER: To our opposition, yes.

3 THE COURT: Okay. All right.

4 MS. GRAHAM-OLIVER: To the declaration of Lisa  
5 Hearn.

6 THE COURT: Okay.

7 MS. GRAHAM-OLIVER: Hearn. H-E-A-R-N-S.

8 THE COURT: Can I make one friendly suggestion that  
9 you can pass along to the new administrator.

10 MS. GRAHAM-OLIVER: Yes, Your Honor.

11 THE COURT: That training is something that she  
12 should sit in on since Lisa Jackson testified that she never  
13 got any training or instruction, knew nothing about any of  
14 these requirements. Maybe the new administrator would be well  
15 advised to take the training course.

16 MS. GRAHAM-OLIVER: Yes, Your Honor.

17 THE COURT: Just a friendly suggestion.

18 MS. GRAHAM-OLIVER: Your Honor, I do want to  
19 reiterate that the administrator did testify that it was her  
20 practice, however, to forward into EPA's accounts any records  
21 pertaining to EPA that were on her personal e-mail accounts.

22 THE COURT: But, according to her, she just dreamed  
23 that up on her own, she was never told by the agency to do  
24 that.

25 MS. GRAHAM-OLIVER: In any event, Your Honor,

1 there's no indication from this record that any of -- that she  
2 destroyed, that she did not follow her general practice of  
3 forwarding e-mails into her account. She also testified on  
4 Page 42 in her deposition that she was instructed -- it's  
5 Page 42, Line 10 through 18. Page 42, Line 5 through 18.

6 Question: Did you have any policy about preserving  
7 e-mails on your personal account? Answer: Can you be more  
8 specific? Are you talking about when I was at EPA?

9 Question: When you were at EPA? Answer: So, what I was  
10 instructed to do was to make a practice, which I did, of  
11 forwarding any e-mails, which could be construed as pertaining  
12 to government business or government records, into the EPA  
13 system so that they could be captured and preserved there,  
14 because that was what I was instructed and told was the way to  
15 handle those situations. And there are examples, many, of me  
16 doing exactly that. That is Ms. Jackson's sworn testimony.

17 THE COURT: Okay. Maybe Ms. McCarthy got the same  
18 instruction then.

19 MS. GRAHAM-OLIVER: Yes, Your Honor. The so-called  
20 "for political reasons" limitation. Your Honor, there are two  
21 parts of the Landmark request. Part one was for any and all  
22 records identifying the names of individuals, groups and/or  
23 organizations outside the EPA with which the EPA was having  
24 communications of any kind relating to all proposed rules and  
25 regulations that were not finalized by EPA between

1 January 1st, 2012, and August 17th. This did not include  
2 public comments.

3 Part two dealt with any and all records indicating  
4 an order, direction or suggestion that the issuance of  
5 regulations, the announcements of regulations and all public  
6 comments of regulations should be slowed or delayed until  
7 after November 2012 or the presidential elections of 2012.

8 Part one, regarding the discussions with outside  
9 parties was deemed to be responsive to part one regardless.  
10 Any discussions with outside parties were deemed to be  
11 responses to part one regardless of the content. And there  
12 wasn't any screen with respect to part one. Records were  
13 produced. The quote, "for political reasons" so-called  
14 limitations, represents EPA's reasonable and good faith  
15 attempt to interpret part two of Landmark's vague request.

16 It clearly stated that they wanted regulations  
17 that -- records indicating an order, directional suggestion  
18 that the issuance of regulations should be delayed or slowed  
19 until after November 2012 or the presidential elections  
20 of 2012. It is a reasonable suggestion that part two, the  
21 delay, was for political reasons. In fact, in deposition  
22 testimony the question was asked that I started out with, and  
23 that was whether there was any indication in the communication  
24 between OIRA and Ms. Jackson and Mr. Perciasepe about a delay,  
25 quote, "for political reasons." So, it was entirely

1 reasonable for that spin to be placed on the second part of  
2 the EPA -- of the request.

3           However, we have again entered into a third search,  
4 if you will, and we have negotiated with Landmark, we have  
5 asked Landmark to cooperate in giving us search terms and in  
6 providing the outside organizations that Landmark thought was  
7 pertinent with respect to the search. And we have understood  
8 now that it's not just for political reasons, but initially  
9 that term -- those terms were EPA's reasonable and good faith  
10 attempt to interpret part two of Landmark's vague request.

11           Also, in --

12           THE COURT: There was no -- if I may. There was no  
13 search prior to the third search now that didn't include that  
14 term "for political reasons"?

15           MS. GRAHAM-OLIVER: No. That's correct, Your  
16 Honor. There was just the supplemental search and the third  
17 search.

18           THE COURT: The supplemental search still  
19 included -- it had to say on its face "for political reasons"?

20           MS. GRAHAM-OLIVER: Okay. It was never a part of  
21 the search, it was a part of the production. It was never a  
22 part of the search, Your Honor. In other words, it wasn't a  
23 limitation on the search. It was not a limitation on the  
24 search.

25           THE COURT: I have never seen -- and I thought you

1 could not now produce what the actual instructions were for  
2 the search; is that not correct? I thought no one could come  
3 up with the actual wording of what the search instructions  
4 were for that first search or for the supplemental search.

5 MS. GRAHAM-OLIVER: Your Honor, I think in Exhibit  
6 Number 1 -- excuse me.

7 THE COURT: Okay.

8 MS. GRAHAM-OLIVER: In Plaintiff's Exhibit 1, and  
9 this is the e-mail that Jonathan Newton sent out to everyone  
10 pertaining to Landmark's request, there was no limitation or  
11 "for political reasons" within that e-mail. It simply stated:  
12 Request description, records relating to proposed rules and  
13 regulations that have not been finalized by EPA between  
14 January 1st, 2012, and August 17th, 2012.

15 The second bullet is records reflecting an order,  
16 direction or suggestion that regulations or comments on  
17 regulations should be delayed until after November 2012. And  
18 there was no added sentence about "for political reasons."  
19 Therefore, the search itself was not restricted or in any  
20 way -- it just pertained to Landmark's request.

21 When the records came in, it's my understanding  
22 that when the records were sorted through, that's when the  
23 "for political reasons" wording came into play, which is not  
24 all together unreasonable given the actual language of the  
25 request.

1           Again, that was only for part two of the request,  
2 not for part one. Your Honor, Landmark has brought up an  
3 issue with respect to Judge Collyer, and that issue pertains  
4 to Judge Collyer's factual findings -- Judge Collyer's  
5 decision in the CEI case. In that case the defendant filed a  
6 motion to dismiss, a 12(b)(6) motion to dismiss. Judge  
7 Collyer has not made any factual findings in that case. She  
8 simply concluded that CEI's allegations were plausible enough  
9 to survive a 12(b)(6) motion to dismiss.

10           The issue with respect to Gina McCarthy in that  
11 case pertained to information that was produced in response to  
12 a different FOIA request and does indicate that during a three  
13 year period of time the assistant administrator, which was  
14 Gina McCarthy at the time for the Office of Air and Radiation  
15 sent approximately, during a three-year period of time, sent  
16 approximately 5,000 text messages that were sent or received  
17 on a mobile device that was assigned to Ms. McCarthy.  
18 However, only 120 of the text messages during this three-year  
19 period were exchanged between her device and a device assigned  
20 to another EPA employee. The remainder of the text messages  
21 were exchanged with phone numbers belonging to family members,  
22 friends, personal acquaintances.

23           It is the agency's understanding that the messages  
24 exchanged with EPA assigned numbers were also personal in  
25 nature, not substantive schedule or -- or non-substantive

1 schedule related. Plaintiff has stated in its reply that it  
2 has developed all of the evidence that it needs. There is no  
3 basis for their request to depose any other EPA employees,  
4 including Ms. McCarthy and other officials.

5 Your Honor, may I have a minute.

6 THE COURT: Sure.

7 MS. GRAHAM-OLIVER: Thanks. Your Honor, I do want  
8 to mention that there was -- that there was no intent and, in  
9 fact, there was no exclusion of the administrator. The  
10 request went directly to the office of the administrator, and  
11 Jonathan Newton is the FOIA coordinator for the office of the  
12 administrator. The FOIA request went directly to Jonathan  
13 Newton to coordinate with other FOIA coordinators in other EPA  
14 program offices and that's exactly what he did. The  
15 administrator's office was not excluded, neither was the  
16 deputy administrator.

17 The testimony is simply that the request went  
18 directly from Jonathan Newton to his counterparts in the other  
19 program offices, and that Jonathan Newton sent then the  
20 request on to the assistant -- the assistants, the staff  
21 assistants, for the former administrator and the former deputy  
22 administrator. There's no evidence that in the interim there  
23 was any destruction of documents or spoliation.

24 THE COURT: No, he just apologized that that  
25 22 delay was his own fault, that he never gave it to the

1 administrator.

2 MS. GRAHAM-OLIVER: Yes, Your Honor, probably  
3 because of his work schedule. But there's no evidence that  
4 there was anything -- no spoliation, no destruction of  
5 documents during that period of time, there's just --

6 THE COURT: But it just so happens that -- it just  
7 so happened that was a big chunk of the time left before the  
8 election, but that was just an accident, I guess.

9 MS. GRAHAM-OLIVER: Jonathan Newton did -- there  
10 was no evidence that was discovered in discovery that one  
11 could even imply from that that the election had anything to  
12 do with the fact that there was that 20-day period of time in  
13 which he sent the FOIA request. There's just no evidence  
14 there.

15 Your Honor, Landmark has stated or made comments  
16 about the memory of Ms. Jackson, that somehow Aaron  
17 Dickerson's request to Ms. Jackson of whether or not she knew  
18 was somehow improper. But, in fact, Aaron Dickerson I think  
19 was actually doing the right thing when he went to Ms.  
20 Jackson. And he not only searched her records, which he did  
21 do, he didn't rely on her memory all together, but he also  
22 went to her with the FOIA request and asked her if she had any  
23 of the records that were described in the FOIA request, and  
24 she said that she didn't recollect having any of those  
25 records.



1           Your Honor, there is -- again, there's absolutely  
2 no evidence or any other basis in which -- and plaintiff never  
3 mentioned it in his brief in terms of a criminal contempt.  
4 And there's no basis upon which this Court can hold the EPA in  
5 criminal contempt. And I just wanted to indicate that  
6 Landmark, as far as I could tell in their briefing, has not  
7 mentioned anything about criminal contempt.

8           THE COURT: Well, clearly, the agency could not be  
9 held in criminal contempt but individuals who provide false  
10 affidavits or false testimony to a Court certainly can be held  
11 in criminal contempt.

12           MS. GRAHAM-OLIVER: And, Your Honor, as stated  
13 previously, there's absolutely no evidence to indicate that  
14 the -- that Mr. Eric Wachter did not believe what he was  
15 saying when he said it in his affidavit. Landmark's case has  
16 become unmoored from his origins of FOIA and have now mutated  
17 into a freeform inquiry of EPA record management with no  
18 boundary.

19           In spite of hours and hours of the deposition  
20 testimony, Landmark has uncovered no smoking gun. In fact,  
21 they never asked the salient question to either Ms. Jackson  
22 or Mr. Perciasepe, the salient question being: Did they  
23 receive any documentation, text message, any e-mail that went  
24 to their personal e-mail accounts that would have indicated  
25 that an order or direction or suggestion that the issuance of

1 regulations were to be slowed or delayed until after  
2 November 2012. Or did they receive any documentation, again,  
3 in their personal e-mails or texts regarding the names of  
4 individuals or organizations with which the EPA consultants  
5 have had communications of any kind relating to all proposed  
6 rules and regulations that have not been finalized by the EPA  
7 between January and August 17, 2012. They never -- Landmark  
8 never asked those pertinent questions. So, in spite of hours  
9 of deposition testimony, Landmark has uncovered no smoking gun  
10 here.

11 THE COURT: Wait a minute. I would assume that  
12 they would not think this is like Perry Mason and that those  
13 people are going to confess on the stand. And I would assume  
14 you could have asked those questions if you wanted them asked.  
15 So, I don't know what your point is.

16 MS. GRAHAM-OLIVER: There's nothing on the record  
17 that would indicate that anything relevant was spoliated.  
18 That's the point, Your Honor.

19 THE COURT: All right.

20 MS. GRAHAM-OLIVER: There simply is no evidence  
21 that any text message or e-mail on personal e-mail accounts  
22 existed that was responsive to Landmark's FOIA request and was  
23 unlawfully destroyed, and therefore, the EPA and the  
24 Government is asking that the motion should be denied.

25 THE COURT: All right. Last question. At the end

1 of the day if the plaintiffs are now not contesting the  
2 adequacy of this most recent search, then this case is going  
3 to be at an end. Do you concede that they would be entitled  
4 to attorney' fees for having prevailed, and so that all of  
5 this becomes more or less only fodder for how much the amount  
6 of the fees is?

7 MS. GRAHAM-OLIVER: May I consult, Your Honor, with  
8 agency counsel?

9 THE COURT: Sure.

10 MS. GRAHAM-OLIVER: Thank you.

11 OFF THE RECORD

12 MS. GRAHAM-OLIVER: Your Honor, we concede that  
13 they have prevailed, but we cannot concede entitlement and  
14 other issues pertaining to the reasonableness of the fees.

15 THE COURT: What does entitlement mean? What would  
16 be the issue there?

17 MS. GRAHAM-OLIVER: Just a minute, Your Honor.

18 THE COURT: Sure.

19 MS. GRAHAM-OLIVER: Your Honor, we do not have the  
20 actual four-part test in front of us, but there is a four-part  
21 test that the circuit has set forth for entitlement of fees,  
22 and we would at least like to take a look at that and possibly  
23 brief that issue -- those issues.

24 THE COURT: All right. All right. I was just  
25 seeing if I could short circuit anything. All right. Thank

1 you very much. Anything else you want to add?

2 MS. GRAHAM-OLIVER: No, Your Honor. Thank you very  
3 much.

4 THE COURT: All right. All right. The plaintiffs  
5 get the last word.

6 MR. FERGENSON: Okay. Thank you, Your Honor. The  
7 standard for entitlement, I believe the four-part standard is:  
8 A, benefit of the public; B, commercial benefit to plaintiff,  
9 plaintiff is not a commercial entity; C, nature of  
10 complainant's interest in the records sought, which is high  
11 and consistent. And EPA keeps saying how much we've -- how  
12 much they've learned from this, I'd say that's a benefit to  
13 the public. And whether the Government's withholding of  
14 records had a reasonable basis in law. That's the four-part  
15 test, I believe, Your Honor.

16 I before I get to the issues, I'd like to respond  
17 seriatim to the points we rely upon, Pension Committee, Judge  
18 Scheindlin's extensive decision on burden and showings  
19 necessary to prevail and to obtain relief in spoliation cases.  
20 We've cited to the appropriate language in our brief and to  
21 the Pension Committee cite. And relevance and prejudice may  
22 be presumed when the spoliating party acted in bad faith or in  
23 a grossly negligent manner.

24 I would ask this Court, as I predicted, to  
25 recognize that what EPA is doing is to conflate their Federal

1 Records Act management practices which preserves documents for  
2 open government purposes, to protect against destruction of  
3 matters that should be preserved and available for the public,  
4 if and when it's appropriate, with spoliation.

5           This is not a Federal Records Act case and their  
6 documents and their reference was all Federal Records Act.  
7 What they don't talk about is spoliation in the litigation  
8 hold memorandum. The litigation hold memorandum, upon which  
9 EPA relied, and said, we would follow this as two things, and  
10 ultimately produced to us in May of this past year. It says  
11 everything on a PDA, personal device, personal electronic  
12 device, including BlackBerrys, everything, is electronically  
13 stored information.

14           And, two, whatever the Federal Records Act may  
15 suggest about preserving documents in a central repository  
16 where they can be archived and preserved. According to  
17 National Archives regulations under the Federal Records Act,  
18 that's got nothing to do with spoliation. In fact, the  
19 litigation hold memorandum says: This is serious. You cannot  
20 get around from preserving e-mails on your personal e-mail  
21 device on your BlackBerry or anywhere else on the grounds that  
22 you've purportedly forwarded it to somebody else or to a  
23 central repository. That is not what is required.

24           The litigation hold memorandum makes clear what EPA  
25 tries to smudge, which is -- forget about the Federal Records

1 Act, if you got a document, and wherever you sent it it's on  
2 your e-mail and it's potentially responsive, you've got to  
3 preserve it. And there's a reason, Your Honor.

4           The testimony, repeatedly, is that there was no  
5 audit of any e-mail, personal e-mail accounts, it was on your  
6 honor and no checking. It's like the memory test, which is  
7 now being applied to three years ago. Do you remember any --  
8 you know, did you ever ask that these be slow rolled or do you  
9 remember any conversations? That is not enough. There was no  
10 audit. There was no review.

11           But the litigation hold was quite specific -- all  
12 of the Federal Record Act requirements and reforms and we'll  
13 really do it right this time, is irrelevant to the issues  
14 before this Court, except insofar as it reflects on EPA's  
15 sloppy management, and that may reflect on its failure to  
16 adhere to the litigation hold memorandum.

17           But all e-mails and text messages residing on the  
18 BlackBerrys were wiped out between February 15th and  
19 February 18th. And it is not quite accurate to say that my  
20 memory -- the administrator said that she didn't do any  
21 government work with text messages. It was -- I'm aware of  
22 the representation by counsel for EPA that Ms. Collyer's use,  
23 except for however many, 270 of the 5,400 or so text messages,  
24 were with family or exchanging telephones number. Here it was  
25 she gave her phone number, which would have been the way to

1 give text messages to people in corporations, people in the  
2 environmental movement, people in government, people in  
3 nonprofits, this is Ms. Jackson, people in academia, and my  
4 family. My family came last on the list.

5 I am not an early adopter. I don't do text  
6 messages, but almost everyone I know under the age of 40 or  
7 even 50 uses text messages, and text messages can contain  
8 substantive information that is preserved. They can say, you  
9 know, why don't you get -- why don't you get those regs out,  
10 are you waiting for the election? Or just: Why don't you get  
11 those regs out?

12 There is substantial communication by text  
13 messaging, and that is what Ms. Jackson testified to. I don't  
14 have any recollection of that. Did you ever say in short  
15 that -- this is Page 25 of her deposition at Line 3. Did you  
16 ever make the same request -- this is the Richard Windsor  
17 account, her secondary account, with respect to text messages,  
18 whether they be on the BlackBerry or otherwise available, that  
19 they go to the Richard Windsor account. Did you ever say in  
20 short: Make sure you search my text messages. This would be  
21 to her deputy or to her personal assistant. I don't have any  
22 recollection of that.

23 So, he didn't search text messages. The man who  
24 was the FOIA coordinator. I can't imagine that I would  
25 have -- can't image -- because I didn't use text messages to

1 do government business in general. That is not the flat  
2 denial. The procedure -- the Federal Records Act procedure  
3 was not obeyed by her. She said: That was my practice. And  
4 that's the evidence we have. She said everything there but,  
5 of course, not anything disclosed to us. But we found -- and  
6 this is Memorandum Exhibit 24, Deposition Exhibit 4, it's  
7 discussed at Page 52, where she sent from her BlackBerry an  
8 e-mail. Now, that would have been on the e-mail server of  
9 EPA, but her Federal Records Act practice was to send  
10 everything to Richard Windsor. No.

11           This one was not sent to the Richard Windsor  
12 account, it would not have been subject to search, given --  
13 following the Federal Records Act, she did not follow the  
14 practice. And then she said, well, you know, I would send it  
15 to maybe eight or nine people. That was enough. We also have  
16 her reference in Exhibits 34 through -- 34, that is Deposition  
17 Exhibit 34, the "Lisa at Home", that was her personal e-mail  
18 account, where she asked -- where she gave out her home  
19 e-mail, as above, in a business-related communication.

20           So, I would ask this Court to focus in on text  
21 messages -- have become -- and now they are even being  
22 abandoned by people in their 20s or 30s, but that is the mode  
23 of communication. I prefer e-mails, but text messages were  
24 very active, and that was her testimony. There was no audit  
25 or review of those.



1                   Now --

2                   THE COURT: Can I ask both sides to do one thing  
3 for me. I was very annoyed in reading these depositions last  
4 night, that in my set of them I did not have any of the  
5 deposition exhibits. I don't know if in fact they were filed  
6 when you filed the depositions as attachments or not, but in  
7 any event I didn't have them. So, it was hard to follow some  
8 of the depositions.

9                   MR. FERGENSON: And I apologize for that, Your  
10 Honor. At the hearing that we had in front of the Court, we  
11 handed the Court a full set of what were then the deposition  
12 exhibits, and I think that covers everything. If I may, let  
13 me ask my colleagues, did we cross-reference memorandum  
14 exhibits with the deposition exhibits?

15                  THE COURT: That flew out of --

16                  MR. FERGENSON: All right. I apologize, Your  
17 Honor, but if you look -- all -- I think all of the exhibits  
18 that we deemed appropriate in our memorandum, we gave  
19 sequential numbers for the memorandum, and then we also cited  
20 to the deposition exhibit number. That is not quite the same,  
21 we probably should have given you a cross-reference from the  
22 deposition exhibit into the memorandum exhibits, and we can  
23 provide that to the Court if that would be helpful. Any  
24 objection from the Government?

25                  THE COURT: I think they have the same -- well, I

1 don't know if they had any depositions, maybe they are all  
2 yours.

3 MR. FERGENSON: I think all of the exhibits are  
4 from us. We gave you a cross-reference from the memo back  
5 into the depositions, we can provide it further --

6 THE COURT: That part of the file --

7 MR. FERGENSON: -- a cross-reference without any  
8 argument from the deposition exhibits into the memorandum  
9 exhibits. But they are also -- they should also be available  
10 in that large binder that we provided the Court, but we can --

11 THE COURT: That's not a problem, I can get that  
12 binder, but it's in D.C., not here.

13 MR. FERGENSON: Okay. We can provide and file it  
14 by letter or other appropriate device to get it to the Court  
15 as a supplemental filing.

16 THE COURT: All right.

17 MR. FERGENSON: Let me do the -- let me try to  
18 clarify search. "Search" under FOIA and "search" as defined  
19 in Mr. Wachter's declarations has three parts. One is  
20 somebody is sent to look. They look. They report back. And  
21 this is what Mr. Wachter defined. This is common sense.  
22 Didn't find any records, or, here are the records. Mr.  
23 Wachter collects them, that's his job. Then he turns over all  
24 responsive records, after reviewing for privilege and other  
25 exemptions, to us. A search that doesn't give us responsive

1 documents is no search under FOIA. We're supposed to get the  
2 documents. A search, and I described it as a tree falling in  
3 an empty forest where somebody goes out and searches and  
4 doesn't tell Mr. Wachter -- no records or here are the  
5 records -- is no search at all. That is exactly what  
6 Mr. Wachter in both -- in his declarations describes.

7 He says there was a -- this is what we do to  
8 search. We go out, they come back. And we have a report from  
9 everyone. We've been very diligent, okay? They have told us,  
10 no, there are no records. But they've given us the records.  
11 Then we discovered we need to do a further search. That is  
12 the lie.

13 Ms. Shaw in her declaration proves that lie. She  
14 never reported back -- that was the transcript of the  
15 deposition testimony that you referenced, and that we did from  
16 Mr. Newton. She went out and she never came back -- never  
17 came back with a response and never came back with the  
18 documents. That's how it merges. The July 24th Wachter  
19 deposition at Paragraph 21 is a flat out falsehood.

20 As part of finalizing the documents for the Court's  
21 April 30th, 2013 filing deadline for summary judgment, my  
22 office carefully reviewed the documents search that was  
23 performed between October 23, 2012 and January 25, 2013.  
24 In the course of this review, on April 29th, 2013, my office  
25 determined that the search for documents from the former

1 administrator, the deputy administrator and the chief of staff  
2 in the office of the administrator may have been insufficient.

3 In the interest of a complete and adequate response  
4 to plaintiff's request, the EPA determined that another search  
5 would be required of the accounts, plural, of the former  
6 administrator, deputy administrator and chief of staff in the  
7 office of the administrator. That is false. There was no  
8 documents found. Here are the documents from Ms. Shaw. There  
9 was no search. And what he's representing to the Court is  
10 that there was a search, but we have to do another search of  
11 the deputy administrator. And they were in a panic.

12 The testimony is that they stood over -- I can't  
13 remember whose desk they stood over -- and said: You do this  
14 search. We got a search. General counsel just put together a  
15 string search, do it of the deputy administrator because it  
16 hasn't been done yet. They knew and they lied to this Court  
17 and to us in doing so.

18 In the 5/15 deposition at paragraph -- they cited  
19 to paragraph -- well, Paragraph 15, the initial document  
20 collection was closed -- this is the Wachter declaration,  
21 Document 30-1 filed May 15th, the other one was filed  
22 July 24th -- was closed on January 25th, 2013. At that point  
23 my office had received a no records response or had  
24 coordinated the collection of documents from the immediate  
25 office of the administrator. By the way, Your Honor, the

1 immediate office of the administrator is the administrative --  
2 deputy administrator and the FOIA coordinator. There's a  
3 little bit of a gliding over, an allusion, by counsel for the  
4 Government.

5           The office of the administrator included  
6 Mr. Newton but is shown by his 22-day later e-mail. He said,  
7 I should have sent this to you earlier and nothing stopped  
8 him, and it was the same e-mail, other than, you know, they  
9 should remember this. Other than that, it was exactly the  
10 same e-mail that he sent to Ms. Shaw and to the FOIA  
11 coordinator for the administrator. He could have added their  
12 names when he sent the initial one. He was in the office of  
13 the administrator but not in the immediate office of the  
14 administrator.

15           This is a representation. He had received a no  
16 records response, Paragraph 15, or had coordinated the  
17 collection of documents from the immediate office of the  
18 administrator and various other places. My office determined  
19 that the remaining headquarters offices had not yet provided a  
20 response that had not yet provided a response, and he listed  
21 1, 2, 3, 4, 5, that are not the immediate office of the  
22 administrator and were not likely to have responsive records.  
23 Those offices do not ordinarily engage in the agency's rule  
24 making activities. That is false.

25           He had received no "no records response". He had

1 received no documents from the deputy administrator who was in  
2 the immediate office of the administrator. No search, as he  
3 defines it, had been accomplished. If Nina Shaw was doing  
4 this on her own and she never got to him, he could not have  
5 lawfully and appropriately signed the declaration that said:  
6 My office has carefully reviewed it and we got everything we  
7 needed from the immediate office of the administrator. That  
8 is a lie.

9           And he compounds the lie, Paragraph 19: In the  
10 course of finalizing the materials for this deadline, my  
11 office determined -- determined that the search for documents  
12 from the former administrator, the deputy administrator and  
13 the chief of staff in the office of the administrator may have  
14 been insufficient. There was no such search that he -- that  
15 had been completed pursuant to his operations. He knew of no  
16 such search and there wasn't.

17           In the interest of a complete and adequate  
18 response, the EPA determined that another search would be  
19 required. In fact, when they all huddled around -- and this  
20 is described in one of the depositions -- when they all  
21 huddled around the computer monitor, they knew -- the people  
22 standing there knew that this was the first search of the DA's  
23 files. And that general counsel's office was brought in  
24 because they needed a search term fast in order to try to do  
25 something.

1           Another search would be required of the accounts of  
2 the former administrator and deputy administrator and chief of  
3 staff in the office of the administrator. Now, I'm not sure  
4 why there has been no factual finding in the -- why that was  
5 urged by the Government, I assume in Judge Collyer's case, I  
6 assume that is designed to limit the -- the collateral  
7 estoppel effect of her findings.

8           Now, on the memory test, why did we not ask them:  
9 Do they remember, among all their duties, whether anyone ever  
10 told them from the White House or from other agencies, the  
11 Department of Interior, or communicated to them in government  
12 or out of government, because the first request is very broad.  
13 It was never -- and I lock this down in the depositions -- it  
14 was never limited, the "for political reasons," no one reading  
15 the first request as opposed to the second request, there was  
16 a space between them, they were independent requests.

17           No one would have applied a responsive document  
18 production -- or responsive document request for political  
19 reasons to the first. It is not reasonable. It is not  
20 accurate. It is not fair. It is not just. It is a pretense.  
21 It is because these are very busy people. It is not a matter  
22 of who called them up or who said, you know, we're going to  
23 delay this, or you got to go back to Mr. Sunstein or, you  
24 know, redo the economic impact analysis. We cannot expect  
25 them to remember that. That's why they're documents. They

1 can't fudge.

2 Documents are hard documents. That's why the  
3 litigation hold memo that was right -- if we're not going to  
4 audit -- this is not an FRA case, we were entitled to the  
5 documents and we were not entitled to the memory of events  
6 that happened two or three years before when they deal in  
7 thousands of e-mails, thousands of text messages.

8 And I wasn't entirely clear, the "for political  
9 reasons" was applied to both one and two, and now we have an  
10 admission that it was applied to that. We don't know who said  
11 it, but it was applied to that. Now, we have not completed  
12 the review of the documents, it's now three years on -- I  
13 think three years on, two years on, that were last produced  
14 about -- on January 8th whenever that was, about two weeks  
15 ago, two to three weeks ago.

16 The records produced, I'm advised by my colleagues  
17 who have looked at them, demonstrate a close monitoring of  
18 regulations by EPA. Records are redacted based on the  
19 deliberative process exemption, so we don't know how much of  
20 the discussion was beyond the fact that regulation issuance  
21 was just a large concern of EPA. It is fair to infer that EPA  
22 officials were concerned about the pace of issuance. We have  
23 not had the opportunity to test the exemption assertions, we  
24 will do so promptly.

25 The records also demonstrated regular meetings



1 between EPA officials and OMB OIRA officials, that's the  
2 office that Mr. Sunstein headed up, and also regular  
3 communication via e-mail. I believe that I responded to each  
4 of the assertions by the Government. If the Government -- I'm  
5 sorry, if the Court seeks further assistance by Landmark, we  
6 will of course provide it.

7           And if there is a filing schedule that the Court  
8 would like to have on the attorneys' fees, I think we have  
9 provided a public service, and I think that our interest -- we  
10 have not flagged in our interest over 14 years, so I think  
11 we're entitled to them. We will do whatever the Court  
12 suggests is appropriate to not only vindicate our own  
13 interests but also to flesh out issues either in briefing or  
14 other procedures that would further inform the Court with  
15 respect to vindication of its interest.

16           Thank you, Your Honor.

17           THE COURT: All right. Thank you very much.

18           MS. GRAHAM-OLIVER: Your Honor, if I may. Counsel  
19 made a statement in his presentation that the wording "for  
20 political reasons" was applied to both the first and the  
21 second part of the FOIA request. That is absolutely untrue.  
22 If you look at Mr. Wachter's declarations, both the initial  
23 declaration, which was filed on May 15, 2013, as well as the  
24 supplemental declaration, it is clear on Page 7, Paragraph 16,  
25 that records were deemed to be responsive to the plaintiff's

1 FOIA request if they were either -- if they either memorized a  
2 meeting, communication with or contact with an outside party  
3 related to a rule that was proposed but not finalized during  
4 the timeframe identified by plaintiff, not including -- not  
5 including standard interagency review of proposed rules or  
6 formal comments on rule making dockets.

7           There was no added "for political reasons" for part  
8 one at all. The "for political reasons" was added on part  
9 two, which pertained to delaying a rule making until after the  
10 election of 2012 or after November 2012, quote, "for political  
11 reasons." That is in Mr. Wachter's declarations. That is  
12 what we argued in our May 15th motion for summary judgment,  
13 which was never challenged in plaintiff's opposition to the  
14 defendant's motion for summary judgment.

15           Thank you, Your Honor.

16           THE COURT: All right. I'll consider the current  
17 motion submitted and I'll rule as promptly as I can. I would  
18 like the plaintiffs, if you would do me the courtesy, since  
19 the rest of my file is in D.C., of filing those exhibits to  
20 the depositions -- just with the notice of filing, something  
21 like that, it will help me, because I have everything  
22 otherwise that I need here.

23           MR. FERGENSON: We will cross-reference going the  
24 other way.

25           THE COURT: Good.

1 MR. FERGENSON: From the depositions into the  
2 memorandum exhibits.

3 THE COURT: Okay. I appreciate that.

4 MR. FERGENSON: Thank you, Your Honor. Shall we  
5 proceed, if the Clerk's office has no objection, if the Court  
6 has no objection, if the Government has no objection, to  
7 providing it by letter? I know the Court has specific rules  
8 about that.

9 THE COURT: I would just do a notice of filing.

10 MR. FERGENSON: Notice. Okay. We will do a  
11 notice.

12 THE COURT: So it's on the record and everybody  
13 sees it. I would say, this is the first time I've try to do  
14 one of these teleconference hearings, and this worked very  
15 well for me, I could hear both of you all very fine. Did this  
16 work for you all as well?

17 MR. FERGENSON: Yes, Your Honor. It's fine.

18 THE COURT: I know sometimes you couldn't hear when  
19 I was --

20 MS. GRAHAM-OLIVER: Yes, Your Honor.

21 MR. FERGENSON: Speaking as not an early adopter,  
22 it was very comfortable.

23 THE COURT: Thank you all very much, Counsel. The  
24 Court will be in recess.

25 END OF PROCEEDINGS AT 12:20 P.M.

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C E R T I F I C A T E

I, Lisa M. Foradori, RPR, FCRR, certify that  
the foregoing is a correct transcript from the record of  
proceedings in the above-titled matter.

Date:\_\_\_\_\_

\_\_\_\_\_  
Lisa M. Foradori, RPR, FCRR

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